Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

THOMAS J. CAPANO,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Delaware

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II

JOSEPH M. BERNSTEIN
Counsel of Record
300 Delaware Avenue – Suite 1130
Wilmington, Delaware 19801
302-656-9850

DAVID A. RUHNKE
RUHNKE & BARRETT
47 Park Street
Montclair, New Jersey 07042
973-744-1000

PAUL SHECHTMAN
STILLMAN & FRIEDMAN, P.C.
425 Park Avenue
New York, New York 10022
212-223-0200

Attorneys for Petitioner Thomas J. Capano

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70 pp

INDEX TO APPENDICES

Page

VOLUME I

APPENDIX A
Decision of the Supreme Court of Delaware, dated August 10, 2001, affirming the Petitioner's conviction and death sentence A-1

VOLUME II

APPENDIX B
Decision of the Superior Court of the State of Delaware, dated March 16, 1999, imposing a sentence of death on Petitioner B-1

APPENDIX C
Decision of the Superior Court of the State of Delaware, dated September 1, 1999, denying defendant's motion to vacate death sentence C-1

APPENDIX D
Text of 11 *Del.C.* § 636 ..... D-1

APPENDIX E
Text of 11 *Del.C.* § 4209 ..... E-1

APPENDIX F
Excerpts of Trial Transcript October 26, 1998 ..... F-1

Excerpts of Trial Transcript November 10, 1998 ... F-2

Excerpts of Trial Transcript December 22, 1998 ... F-2

Excerpts of Trial Transcript December 30, 1998 ... F-4

Excerpts of Trial Transcript January 11, 1999 ..... F-5

Excerpts of Trial Transcript January 28, 1999 .... F-12

State's Exhibit 147 ..... F-13

APPENDIX B

STATE OF DELAWARE v. THOMAS J. CAPANO, DEF. ID # 9711006198

CRIMINAL ACTION NO. IN97-11-0720

SUPERIOR COURT OF DELAWARE, NEW CASTLE

1999 Del. Super. LEXIS 541

March 16, 1999, Decided

DISPOSITION:

Court concludes sentence for defendant's commission of murder of Anne Marie Fahey shall be death by lethal injection.

COUNSEL:

Ferris W. Wharton, Esquire, Department of Justice, Wilmington, Delaware and Colm F. Connolly, Esquire, U.S. Attorney's Office, Wilmington, Delaware, Attorneys for the State.

Eugene J. Maurer, Jr., Esquire, Eugene J. Maurer, Jr., P.A., Wilmington, Delaware; Charles M. Oberly III, Esquire, Oberly, Jennings & Drexler, P.A., Wilmington, Delaware; Joseph S. Oteri, Esquire, Boston, Massachusetts; and John F. O'Donnell, Esquire, Fort Lauderdale, Florida, Attorneys for the Defendant.

JUDGES:
William Swain Lee, Judge.

OPINION BY:
William Swain Lee

OPINION:

MEMORANDUM OPINION

LEE, J.

On January 17, 1999, defendant Thomas J. Capano ("defendant") was convicted of murder in the first degree for the death of Anne Marie Fahey. On January 28, 1999, after completion of a penalty phase hearing, eleven (11) of the jurors found a statutory aggravating circumstance existed, while one (1) found it did not. The jury, in finding the aggravating circumstances outweigh mitigating ones, also recommended that the death penalty be imposed by a vote of ten (10) to two (2). This Court considers the jury's recommendation; however, it must make the ultimate determination of whether to impose a sentence of death or of life in prison without probation, parole or any other reduction. This is that decision.

I. BACKGROUND

Defendant is an attorney who was admitted to the Delaware Bar in 1975.[1] He was married for twenty-six (26) years, and this marriage produced four daughters. He has performed public service over the years, working as a Deputy Attorney General, as City Solicitor during the administration of Mayor Daniel Frawley, and as legal counsel to Governor Michael Castle. At the time of the crime, he was managing partner at the Wilmington office of the law firm of Saul, Ewing, Remick & Saul, L.L.P. He has performed charity work and been a source of strength for his mother and his siblings, which include three brothers and a sister. By all accounts, defendant appeared

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[1] Defendant's license to practice law has been suspended pending the outcome of these proceedings.

to be an upstanding member of Delaware's community. However, there was another life defendant led which was hidden from virtually everyone. That life included affairs with numerous mistresses. One of the affairs was with Anne Marie Fahey ("Fahey").

Fahey last was seen alive on June 27, 1996. That evening she had dinner in Philadelphia, Pennsylvania with defendant. Fahey's family reported her missing on June 30, 1996.

Fahey was the scheduling secretary to Delaware's Governor, Thomas Carper. The President of the United States knew of Fahey through dealings with Governor Carper, and when he learned about her disappearance, he offered, in early July, the help of the federal government. The Federal Bureau of Investigation ("FBI") joined an investigation into Fahey's disappearance on or about July 8, 1996. The United States Attorney's Office joined the investigation no later than July 25, 1996. In July, 1996, the United States Attorney's Office for the District of Delaware, the FBI, and the Wilmington Police Department began a federal Grand Jury kidnapping investigation into the disappearance of Fahey.

Until he testified at his trial, defendant maintained that he had not seen Fahey since he dropped her off at her apartment on the evening of June 27, 1996. Even though he knew that Fahey was dead and that he had disposed of her body in the Atlantic Ocean, defendant suggested over the next two years other theories for her disappearance: she might be at the Jersey Shore, she might have gone off to another country, she was suicidal,

someone else might have killed her. Despite his knowledge that many were looking for her, even keeping a vigil at her apartment, he never bothered to tell anyone that she was dead.

Breaks in the case came from defendant's brothers. Defendant's brother Gerard Capano ("Gerard") told investigators that he had helped defendant dispose of a body in the Atlantic Ocean on June 28, 1996. The body had been in a cooler, and, when the cooler would not sink, the body and the cooler were separately thrown into the ocean. Fishermen found a cooler, and it was shown that defendant purchased an identical cooler on April 20, 1996. Additionally, Defendant's brother Louis Capano ("Louis") told investigators that at the end of June, 1996, he instructed employees to dispose of items in a dumpster owned by his company. Defendant had told Louis he had thrown into the dumpster personal items of Fahey as well as a sofa which had Fahey's blood on it.[2]

The information gathered during the federal investigation was turned over to the State of Delaware ("the State"). On November 12, 1997, defendant was arrested on the charge of Murder in the First Degree in the death of Fahey. A Delaware Grand Jury indicted defendant on that charge on December 22, 1997. Defendant has been incarcerated since his arrest.

Defendant's proof positive hearing pursuant to 11 Del. C. § 2103(b) took place from February 2 through

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[2] Defendant told Louis that Fahey had slit her wrists on the evening of June 27, 1996 and had bled on the sofa; that he had thereafter taken Fahey home, never to see her again.

February 6, 1998. Defendant hoped to obtain bail, and in connection with that hearing, defendant attempted to manipulate another of his lovers to testify on his behalf. This lover was Deborah MacIntyre ("MacIntyre"). MacIntyre and defendant, who had been lovers since May, 1981, continued to have contact during defendant's incarceration through letters and telephone calls. Meanwhile, MacIntyre was having problems with the government in connection with her story concerning her purchase and disposal of a gun before the murder of Fahey. Ultimately, MacIntyre did not testify on behalf of defendant. Instead, she hired a new attorney and entered into an agreement with the government that required her to testify truthfully concerning the gun in exchange for not being prosecuted for her prior lies concerning it.

The story concerning the gun which defendant did not want told is as follows. In April, 1996, defendant told MacIntyre he wanted her to buy a gun for him because someone was trying to extort him. On May 13, 1996, defendant met MacIntyre at a gun store. MacIntyre went in and purchased the gun at defendant's request. MacIntyre then gave the gun to defendant. She never saw the gun after she gave it to him, and during the investigation into Fahey's disappearance, defendant asked her to lie about the gun. He also told her the gun was gone "deep in the water."

Armed with the evidence noted above as well as other evidence, the State proceeded to prosecute defendant.

II. THE CRIME

The guilt phase of the trial in this matter began on October 26, 1998. At that trial, along with much of the evidence noted above, the following evidence was established pertaining to the murder of Fahey and the disposal of her body thereafter.

Fahey had been trying to end the relationship with defendant. She had begun a new relationship, and this relationship had potential to be meaningful and long-term. About the time Fahey was working on her new relationship, defendant had separated from his wife. When Fahey began pulling away from defendant, defendant became extremely angry at Fahey and he expressed his rage at her during several violent episodes. Defendant continued to pursue Fahey. It appears that near the time of her death, Fahey hoped that they had established a friendship and she attempted to deal with defendant on that basis.

Around February, 1996, defendant concocted a story which he told Gerard and another brother, Joseph Capano ("Joseph"). The story was that an extortionist or extortionists was/were threatening him.[3] He asked Gerard for help should he have to kill the extortionist(s). Specifically, he asked to borrow Gerard's boat to dispose of the body(ies).

On April 20, 1996, defendant purchased a cooler identical to the one in which Fahey's body was disposed.

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[3] The number of extortionists changed and the reason for the threat never was clarified.

On May 13, 1996, defendant had MacIntyre purchase a gun for him.

On June 27, 1996, defendant took Fahey to dinner in Philadelphia. After dinner, they returned to his home. He killed her that evening in his home.

Defendant testified that he did not kill her, but instead, MacIntyre killed her. According to him, MacIntyre came to his house. She had a gun with her. When MacIntyre saw Fahey with defendant, she threatened to shoot herself. As MacIntyre went to shoot herself, defendant grabbed MacIntyre's arm; MacIntyre shot Fahey directly behind the right ear, killing her instantly. After a few moments of panic, he pulled himself together, sent MacIntyre home, and cleaned up. He put Fahey's body in the cooler, which according to him, he had bought as a present for Gerard.

The jury found defendant's testimony to be incredible.[4] The jury obviously believed MacIntyre's testimony that she was not present at defendant's house that night and did not kill Fahey.

Defendant is the only person who knows exactly how he killed Fahey.

The next day, defendant and Gerard took Fahey's body to Gerard's boat, which was docked at the New Jersey shore. The two of them put the cooler on the boat

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[4] In March, 1998, defendant sent a letter to another ex-lover, Susan Louth, wherein he asked her to tell people that MacIntyre had killed Fahey and he indicated his hope that this story would influence the jury pool.

and took it approximately sixty miles out to sea. Defendant then threw the cooler overboard. It would not sink. Gerard took a shotgun used for killing sharks and shot the cooler in an attempt to make it sink. It still would not sink. Defendant pulled the body from the cooler and wrapped it with the chain and anchor, finally causing it to sink. Gerard saw a human foot as the body sunk below surface.[5] Gerard subsequently threw the cooler overboard.[6]

III. PENALTY PHASE

The testimony presented at the penalty phase is summarized below.

IV. THE PARTIES' CONTENTIONS

The State contended that one statutory aggravating circumstance existed: that the murder was premeditated and was the result of substantial planning. 11 Del. C. § 4209(e)(1)u.[7]

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[5] Gerard testified he did not see anything else because he purposefully would not look.

[6] As noted earlier, fishermen later found a cooler, which verified Gerard's story.

[7] In 11 Del. C. § 4209(e)(1)u., it is provided in pertinent part:

> Aggravating circumstances. – (1) In order for a sentence of death to be imposed, the judge must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances. . . . :

The State also contended that the following non-statutory aggravating circumstances existed:

1) Evidence of the impact of the murder upon friends, family and co-workers of Fahey;

2) Evidence of past actions of defendant seeking to harm an ex-lover;

3) Evidence of defendant's vindictiveness;

4) Evidence of defendant's criminal conspiracies during the investigation and while in prison;

5) Evidence of defendant's continuing manipulative behavior;

6) Evidence of defendant's lack of remorse;

7) Evidence of defendant's disdain for authority.

8) Evidence that the defendant remains a threat to direct crimes of vengeance while incarcerated.

Defendant disputed the existence of any elements which would establish the statutory aggravating circumstance of a premeditated murder which was substantially planned.

Defendant contended that the following mitigating circumstances existed in his case:

***u. The murder was premeditated and the result of substantial planning. Such planning must be as to the commission of the murder itself and not simply as to the commission or attempted commission of any underlying felony.

1) The lack of any prior criminal record;

2) The need for his daughters to have him in their lives;

3) The need for his mother to have him in her life;

4) The need of other family members to have him in their lives;

5) The intense guilt which Louis and, particularly, Gerard would feel for their part in participating in these proceedings which might result in defendant's death;

6) Defendant's community service;

7) Defendant's ability to help others in prison.

V. THE STATE'S EVIDENCE

The State contended that defendant substantially planned the murder, and it argued this was evidenced by a number of his actions. In late winter, early spring, 1996, defendant made inquiries to Gerard to use his boat in order to dump the body.[8] These arrangements were made by cover of the extortionist story which defendant told in February, 1996. In April, 1996, defendant purchased a cooler identical to that which became Fahey's coffin. Finally, in May, 1996, defendant had MacIntyre purchase a gun for him.

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[8] Interestingly, while working as a deputy attorney general, defendant prosecuted a case where the victim was shot behind the ear and the defendant in that case disposed of the murder victim's body by throwing it into the water.

The rest of the State's evidence dealt with non-statutory aggravating circumstances.

Fahey's family testified to the impact of the murder on their lives. They testified to what a positive influence Fahey had on their lives. She was a best friend to her sister, an integral part of the close-knit Fahey family which consisted of her siblings, their spouses and their children. She was an attentive aunt to her nephews. She was troubled, but there was a joie de vivre about her that infected others around her. She was loved by her family and by many friends and will be forever missed.

Family and friends still have a difficult time dealing with her death. For over two years, they did not know for certain what happened to Fahey or her body. They learned during the trial that she had been killed and her body tossed into the ocean. Family members continue to have a most difficult time dealing with her body's disposal and the fact that they never will have the opportunity to properly bury her.

The evidence showed defendant is manipulative, controlling, vindictive. His need for control over those around him is overwhelming. If someone breaks away from him or disobeys him, he lashes out with anger and violence. Not only does he take action on his own, but he conspires with others to help him in his schemes to punish that person for their disloyalty. For example, in the early 1980's, defendant conspired to have an ex-lover injured because she had rejected him. Ultimately, this ex-lover had to leave town in order to avoid the harassment he either was committing or was having committed against her. Because she rejected him, defendant ran her

out of town and conspired to have her harmed. When defendant learned that MacIntyre refused to continue lying about the gun, he conspired with another inmate to have her house burglarized. His purpose was to intimidate her into continuing to lie for him and to not testify truthfully regarding the gun. He did not want his brothers Louis and Gerard to testify on his behalf in the penalty phase because he would rather they have suffered guilt than speak to save his life. He pressured his mother and sister to ostracize Gerard and Louis for their disloyalty to him. He killed Fahey when she sought to terminate their relationship and he involved MacIntyre, Gerard and Louis in this murder.

The State presented evidence showing that defendant has no regard for rules. He has violated the prison rules numerous times. He conspires with other inmates to beat the prison system. He has done nothing constructive while in prison.

It also is noteworthy that defendant breached many rules the Court imposed during these proceedings. The Court, directly, and through counsel, on numerous occasions set forth rules to defendant which it expected him to follow, and defendant consistently violated those rules. He openly defies authority.

Finally, defendant has shown no remorse. He has not shown remorse for the death of a woman he claimed to love or for the impact of his actions on his long-term mistress, his family, the Faheys or friends whose lives have been forever damaged by his actions. Defendant's brother-in-law stated that defendant's medications have precluded him from showing any emotions. However,

throughout this trial, defendant has shown a plethora of emotions: anger, defiance, contempt, and concern for some members of his family. He just has not shown the appropriate emotions: remorse, sadness, guilt, horror at his actions.

VI. DEFENDANT'S EVIDENCE

Defendant's position regarding the substantial planning requirement is that none of the elements required to establish substantial planning existed. First, defendant maintained that he purchased the cooler as a present for Gerard, not for use as a coffin. Second, he testified that he never told Gerard or Joseph any stories about extortionists. Finally, he testified that he never went with MacIntyre to purchase a gun and he never saw her with a gun until she appeared at his house on the evening of Fahey's death.

Defendant produced the following evidence regarding mitigating circumstances.

First and foremost, he is the father of four wonderful daughters who need him. These girls have regular contact with their father, they love him very much, they support him, and they want him in their lives forever.

Second, other members of the family want defendant to continue to be a part of their lives. Defendant has been a strong presence in his family over the years, providing his mother, his siblings and their children emotional support, advice, guidance. They need him and want him to continue being a part of their lives.

Third, defendant led a good life and performed much public service. Defendant worked as a Deputy Attorney General, as City Solicitor during the administration of Mayor Daniel Frawley, and as legal counsel to Governor Michael Castle. He was active in his parish and he performed much work for the Catholic Church. He was on the Board of Directors and active in the affairs of several parochial schools. He participated in his daughters' lives and activities. He performed charity work. By all accounts, defendant appeared to be an upstanding member of Delaware's community. However, that good, even model, life is tainted by the private life he led, the life that was private even from his family.

The fourth mitigating circumstance is the impact of a death sentence on Louis and Gerard. Of most concern to this Court is the likelihood that a death sentence would debilitate Gerard. Gerard feels tremendous guilt for having "betrayed" the defendant by telling the truth. He would feel great responsibility and remorse for any death sentence imposed.

The fifth mitigating circumstance is that defendant could help others in prison such as by teaching them to read or providing legal advice if he is allowed to live, a possibility he, himself, did not choose to explore in his allocution.

VII. THE COURT'S SENTENCING DETERMINATIONS

A. THE PROCEDURE

The procedure which is to be followed in the penalty phase of a first degree murder case is set forth in 11 Del. C. § 4209. Where there is trial by jury, the jury hears evidence pertaining to aggravation and mitigation and it hears argument from counsel for both sides. Then, the Court gives instructions and directs the jury to decide whether the evidence shows beyond a reasonable doubt that a least one statutory aggravating circumstance exists and whether the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. 11 Del. C. § 4209(d).

In connection with its sentencing recommendation, the jury in this case had to respond to two questions. The first question was whether the evidence showed beyond a reasonable doubt the existence of the statutory aggravating circumstance, i.e., that the murder was premeditated and the result of substantial planning. The second question was whether the jury found by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found to exist outweighed the mitigating circumstances found to exist. The jury found by a vote of eleven (11) to one (1) the existence of the enumerated statutory aggravating circumstance. The jury found by a vote of ten (10) to two

(2) that the aggravating circumstances outweighed the mitigating circumstances.

After the jury has made its determination and recommendation, this Court must decide the same questions. *Wright v. State,* Del. Supr., 633 A.2d 329, 335 (1993), *cert. den.,* 517 U.S. 1249, 116 S. Ct. 2509, 135 L. Ed. 2d 198 (1996). The Court may reject the jury's recommendation. *Lawrie v. State,* Del. Supr., 643 A.2d 1336, 1346 (1994), *cert. den.,* 513 U.S. 1048, 115 S. Ct. 646, 130 L. Ed. 2d 551 (1994). However, the Court does not ignore the jury's findings; instead, it considers the jury's recommendation when deciding what sentence to impose. 11 Del. C. § 4209(d). But, in any case, the Court renders the final decision on the sentencing. *Shelton v. State,* Del. Supr., 652 A.2d 1, 5 (1995). If the Court does not find a statutory aggravating circumstance exists beyond a reasonable doubt, then a life sentence must be imposed. 11 Del. C. § 4209(d). If it does find the existence of a statutory aggravating circumstance beyond a reasonable doubt, then it undertakes the weighing process set forth in 11 Del. C. § 4209(d) (1)b.

I follow the statutory procedure below.

B. STATUTORY AGGRAVATING CIRCUMSTANCE

I conclude that the State has proven beyond a reasonable doubt the existence of the following statutory aggravating circumstance: the murder was premeditated and the result of substantial planning. 11 Del. C. § 4209(e) (1)u. Within the same time frame, defendant had MacIntyre buy a gun; he purchased the cooler; he made plans to

borrow Gerard's boat; by creating the story of the possible need to kill extortionist(s), he laid the groundwork for a cover story which would allow his brother to help him dispose of a body; and he lulled Fahey into a false sense of security by pretending that he would settle for being her friend. Defendant took these steps during and after Fahey rejected him as her lover. Defendant had a plan and he worked on that plan for months before he ultimately murdered Fahey when it became clear to him that she had rejected him as her lover.

The defense has argued that if defendant had a plan, he would not have been so sloppy. His plan was not sloppy. Instead, a number of circumstances occurred which defendant obviously did not anticipate, and these circumstances helped to expose defendant as the murderer. These circumstances were the recovery of the cooler by the fishermen which verified Gerard's story; the recovery of a blood donation by Fahey which led to the ability to compare that blood to blood spots found in defendant's house; and the intervention of the federal government into the investigation which gave the investigating authorities access to a wider range of resources than the State or the City of Wilmington might otherwise have had. The involvement of Federal and State agencies outraged the defendant who suffered from the delusion that he and his friends were so powerful within the City of Wilmington that murder could be "worked out" with the Wilmington Police Department.[9]

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[9] Defendant indicated in his trial testimony that he thinks there are some rules of fair play which would have precluded the federal government's participation in the criminal

The Court is satisfied that the State proved beyond a reasonable doubt that defendant premeditated the murder of Anne Marie Fahey and he substantially planned that murder.

C. NON-STATUTORY AGGRAVATING CIRCUMSTANCES

The Court is satisfied that the State has proved by substantial and reliable evidence the existence of the following non-statutory aggravating circumstances:

1) Substantial impact of the murder upon friends, family and co-workers of Fahey;

2) Past actions of defendant seeking to harm an ex-lover;

3) Defendant's vindictiveness;

4) Defendant's criminal conspiracies;

5) Defendant's continuing manipulative behavior;

6) Defendant's lack of remorse;

7) Defendant's disdain for authority.

8) Defendant remains a threat to direct crimes of vengeance while incarcerated.

This murder has had and will continue to have a long-lasting, profound impact on the Fahey family, on Fahey's friends and on her co-workers. They have been deprived, respectively, of a beloved sister, aunt, and

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investigation, thereby resulting in his ability to escape conviction and punishment for murdering Anne Marie Fahey.

friend. Defendant brought pain and heartache on many innocent people, and destroyed the lives of many.

Defendant is manipulative, vindictive, and disdainful of authority. It is unlikely that he will adjust well to prison life and he probably will continue to defy prison authorities. It is likely that he will continue to involve other inmates in conspiracies to break prison rules or to mete out punishments to those he considers deserving of such.

Defendant is not remorseful for his actions resulting in the death of Fahey or in the disposal of her body. He only is angry that the Government was able to catch him, and that MacIntyre, Gerard and Louis were disloyal when required to tell the truth.

D. MITIGATING CIRCUMSTANCES

I find the following mitigating circumstances exist in this case:

1) Defendant's lack of any prior criminal record;

2) The need for his daughters to have him in their lives;

3) The need for his mother to have him in her life;

4) The need of other family members to have him in their lives;

5) The intense guilt which Louis and, particularly, Gerard would feel for their part in

participating in these proceedings which might result in defendant's death;

6) Defendant's community service.

I do not find that defendant is likely to help others while in prison. He has not yet undertaken to help others in a positive manner and it is likely that if he befriends anyone, it will be with the purpose of having that person do something for him.

VIII. GUIDELINES TO FOLLOW IN WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES

The Court does not merely weigh the number of aggravating circumstances against the number of mitigating circumstances.

The procedure to be followed by the trial judges . . . is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Delaware v. Cohen, Del. Supr., 604 A.2d 846, 849 (1992) (citing *State v. Dixon*, Fla. Supr., 283 So. 2d 1, 10 (1973)). In determining the appropriate punishment, the Court weighs qualitatively rather than quantitatively. *State v. Manley & Stevenson*, 1997 Del. Super. LEXIS 5, *49, Del. Super., ID Nos. 9511007022, 9511006992, Barron, J. (January 10, 1997), *aff'd., Stevenson v. State*, Del. Supr., 709

A.2d 619 (1998); *Manley v. State*, Del. Supr., 709 A.2d 643 (1998).

IX. THE WEIGHING PROCESS

Defendant planned, over a period of time, to kill Anne Marie Fahey and to dispose of her body so that it could not be found. He then blamed the murder on an ex-lover who had testified against him. The crime defendant committed was horrific. The crime epitomized the makeup of his character: vindictive and controlling.

As was the case in *State v. Gattis*, 1992 Del. Super. LEXIS 474, Del. Supr., Cr. A. Nos. IN90-05-1017 – 1019; IN90-05-1106 & 1107, Barron, J. (October 29, 1992), *aff'd*, Del. Supr., 637 A.2d 808 (1994), *cert. den.*, 513 U.S. 843, 115 S. Ct. 132, 130 L. Ed. 2d 75 (1994), some may argue that a defendant should not receive the death penalty for a domestic homicide. It is appropriate to quote from Judge Barron in response to such a contention.

There are those who would consider less heinous and, therefore, more amendable to sentencing leniency, a murder committed against a spouse, paramour or girl-friend (i.e., a domestic homicide), as compared with a murder for pecuniary gain or a murder committed during the commission of a robbery or rape of a stranger. Conceptually, such a distinction is arguably supportable. Firstly, there is likely to be no statutory aggravating circumstance with regard to the former as opposed to the latter. See: 11 Del. C., § 4209(e)(1)j. and (e)(1)o.; 11 Del. C., § 4209(e) (2). Secondly, it is common with regard to domestic homicides that the perpetrator was under the

influence of extreme emotional distress or that his capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired, while the latter class of homicides are normally perceived to be more callous and cold-blooded. Thirdly, the victim of a domestic homicide is often looked upon with less sympathy than a victim of, for example, a robbery-murder for the reason that the domestic homicide victim could have changed her living arrangement but opted not to do so, a rather twisted concept akin to consent.

As stated, this case is not a typical domestic homicide case. Here, two statutory aggravating circumstances were proven beyond a reasonable doubt. Moreover, the murder was committed in a callous manner without moral or legal justification. It was planned beforehand with adequate time for the defendant to contemplate the consequences of carrying out his intent. Further, the victim, tired of her relationship with the defendant, had endeavored to start a new life on her own.

Footnotes omitted.

State v. Gattis, 1992 Del. Super. LEXIS 474, * 43-46.

The circumstances of the murder here are similar to those in *Gattis*. No one, except the defendant, ever will know exactly how or why Anne Marie Fahey died. What is certain is that it was not a crime of passion but, rather, a crime of control. By all accounts, she had ceased to be defendant's lover but had never escaped his sphere of influence, control and manipulation. Defendant's premeditation and planning was for a contingency that, perhaps, he hoped would never happen, but did, on the

evening of June 27, 1996. He chose to destroy a possession rather than lose it; to execute an escaping chattel.

The only mitigating circumstances of significance to this Court concern defendant's daughters and the impact of the crime on Gerard. Defendant's daughters' love for their father is deep and genuine and they want him in their lives. However, during this trial, defendant has shown that he will take advantage of his daughters to accomplish an end which benefits himself. Their love for him is great. However, since defendant's past history is a prime indicator of his future behavior, it is clear that defendant poses a threat of harm to his daughter's well-being.

Gerard does not want defendant sentenced to death; he will feel great responsibility for it. Gerard bears no blame; instead, the blame goes directly to defendant. Defendant involved Gerard in his murder plans. Defendant committed the murder. Defendant is the one who must accept all blame, but does not because of his flawed character. Gerard should understand that defendant is reacting in his normal way: to strike out at the disloyal subject and punish that person who attempts to do what is right and not immoral.

Absent the harm to his daughters and to Gerard, there is nothing in defendant's life which would call for the imposition of a life sentence. Defendant will not adjust well in prison; he will constantly scheme to bypass prison rules; he will defy prison authority; he will continue to manipulate those who love him from within the prison walls. He poses a threat of harm even while incarcerated. He committed a horrific crime. That crime

and his antisocial behavior outweigh any mitigating circumstances. The sentence of death is warranted in this case.

X. CONCLUSION

The Court concludes that the sentence for defendant's commission of the murder of Anne Marie Fahey shall be death by lethal injection.

IT IS SO ORDERED.

Sentencing Order is to follow.

William Swain Lee

Judge

APPENDIX C

STATE OF DELAWARE v. THOMAS J. CAPANO

CRIMINAL ACTION NO. N97-11-0720

SUPERIOR COURT OF DELAWARE, NEW CASTLE

1999 Del. Super. LEXIS 324

July 25, 1999, Date Submitted

September 1, 1999, Date Decided

SUBSEQUENT HISTORY:

Released for Publication by the Court September 23, 1999.

DISPOSITION:

Motion for New Trial and/or Death Penalty Hearing Or In Alternative Judgment of Acquittal as to Death Sentence Denied. Motion to Interview State Witness Denied.

COUNSEL:

Ferris A. Wharton, Esquire, Department of Justice, Wilmington, Delaware, Attorney for the State.

Charles M. Oberly III, Esquire, Oberly & Jennings, P.A., Wilmington, Delaware, Attorneys for the Defendant.

JUDGES:

LEE, J.

OPINION BY:

LEE

OPINION:

MEMORANDUM OPINION

Motion for a New Trial and/or Death Penalty Hearing Or In the Alternative Judgment of Acquittal as to the Death Sentence

Motion to Interview a State Witness

LEE, J.

Pending before the Court is the motion of defendant Thomas J. Capano ("defendant") for a New Trial and/or Death Penalty Hearing or in the Alternative Judgment of Acquittal as to the Death Sentence ("the pending motion").[1] In his original motion, defendant advanced three grounds to support the pending motion. Subsequent thereto, defendant has asserted other grounds for a new trial and, in addition, has requested that he be allowed to interview Deborah MacIntyre, a witness for the State of Delaware ("the State"). I have denied some of those grounds on the record. However, there are two matters which I have not addressed on the record, and they will be addressed herein along with the original three grounds.

This constitutes my decision on the pending motion and on the request to interview Ms. MacIntyre.

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[1] An appeal has been taken to the Delaware Supreme Court. The Supreme Court has remanded the matter in order for this Court to deal with the pending motion.

FACTS

On January 17, 1999, defendant was convicted of murder in the first degree for the death of Anne Marie Fahey ("Fahey"). On January 28, 1999, after completion of a penalty phase hearing, eleven (11) of the jurors found a statutory aggravating circumstance existed, while one (1) found it did not. The jury, in finding the aggravating circumstances outweigh mitigating ones, also recommended that the death penalty be imposed by a vote of ten (10) to two (2). This Court considered the jury's recommendation; however, it made the ultimate determination of whether to impose a sentence of death or of life in prison without probation, parole or any other reduction. In its decision of March 16, 1999, the Court found that the State proved beyond a reasonable doubt that defendant premeditated the murder of Anne Marie Fahey and he substantially planned that murder. It further found and concluded that the State proved by substantial and reliable evidence the existence of the following non-statutory aggravating circumstances:

1) Substantial impact of the murder upon friends, family and co-workers of Fahey;

2) Past actions of defendant seeking to harm an ex-lover;

3) Defendant's vindictiveness;

4) Defendant's criminal conspiracies;

5) Defendant's continuing manipulative behavior;

6) Defendant's lack of remorse;

7) Defendant's disdain for authority.

8) Defendant remains a threat to direct crimes of vengeance while incarcerated.

The Court found the following mitigating circumstances existed in this case:

1) Defendant's lack of any prior criminal record;

2) The need for his daughters to have him in their lives;

3) The need for his mother to have him in her life;

4) The need of other family members to have him in their lives;

5) The intense guilt which his brothers Louis and, particularly, Gerard, would feel for their part in participating in these proceedings which might result in defendant's death;

6) Defendant's community service.

Finally, the Court found the aggravating circumstances outweighed the mitigating circumstances and accordingly, on March 16, 1999, imposed the death penalty.

On April 5, 1999, defendant filed the pending motion.[2] Defendant sets forth three grounds in support of that motion: failure of the jury to unanimously find an aggravating circumstance beyond a reasonable doubt; irreconcilable conflict in testimony; and record of juror dismissals. Since filing the pending motion, defendant

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[2] The Court expanded the period within which such a motion could be filed from seven (7) to twenty (20) days. Super. Ct. Crim. R. 33.

has asserted another ground for a new trial pertaining to a dismissed juror and he has requested he be able to interview Ms. MacIntyre.

DISCUSSION

Lack of Unanimity

The first ground defendant advances in support of the pending motion is that the jury did not return a unanimous verdict that there existed a statutory aggravating circumstance. He argues as follows in the motion:

> The standard of beyond a reasonable doubt as used in the context of a jury trial in Delaware has always required a unanimous verdict. In *Fountain v. State,* Del. Supr., 275 A.2d 251, the Court ruled that "it is of course fundamental under our law that the verdict of a jury must be unanimous." The basis for the Court's holding was the language of Article I, Sec. 4 of the Delaware Constitution of 1997 [sic], which provides: "The right to trial by jury shall be as heretofore." At the time the Delaware Constitution was adopted, the death penalty could only result form [sic] a unanimous verdict, which was the result of a guilt determination reached beyond a reasonable doubt. Thus, a death sentence at the time of the enactment of the Delaware Constitution could only result from a unanimous verdict, as that was the law in 1897 and before. *Cahill v. State,* Del. Super., 411 A.2d 317 (1980), rev'd on other grounds, Del. Supr., 443 A.2d 497 (1982). The passage into law of 11 Del. C. Sec. 4209 with the then existing aggravating circumstances and those added during the years following could not lawfully amend the

Delaware Constitution so as to dilute the unanimity requirement for finding a death sentence.

Of course, this argument is invalid as a reading of several Delaware Supreme and Superior Court decisions evidences. *Shelton v. State,* Del. Supr., 652 A.2d 1, 5-6 (1995); *Lawrie v. State,* Del. Supr., 643 A.2d 1336, 1346 (1994), *cert. den.*, 513 U.S. 1048, 115 S. Ct. 646, 130 L. Ed. 2d 551 (1994); *State v. Cohen,* Del. Supr., 604 A.2d 846, 851-52 (1992); *Gattis v. State,* Del. Super., 1995 Del. Super. LEXIS 608, Cr. A. Nos. IN90-05-1017 et al., Barron, J. (December 28, 1995) at 45-8, aff'd, Del. Supr., 697 A.2d 1174 (1997).[3] Consequently, in light of the above-cited decisions, defendant, in his letter memoranda dated July 16, 1999, in support of this pending motion, seeks to distinguish the decision of *State v. Cohen, supra.*

Defendant argues as follows.

In determining whether a statutory aggravating circumstance exists, the jury must make a finding based upon the evidence. "Nothing in the new law suggests that in requiring a finding beyond a reasonable doubt the legislature was abandoning the unanimity requirement necessary for all factual determinations." Defendant's Letter Memorandum dated July 16, 1999 at 6. The determination of whether there is a statutory aggravating circumstance is not a sentencing function; instead, it is a

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[3] The Superior Court initially issued its decision in the matter on August 24, 1995. *Gattis v. State,* Del. Super., Cr. A. Nos. In 90-05-1017, et. al. Barron, J. (August 24, 1995). It reissued the decision on December 28, 1995. The reissued decision is identical to the first plus it includes the Court's decision on the defendant's motion to reargue.

necessary statutory prerequisite to reaching the weighing function, and it is a factual determination. The jury must be unanimous in making this factual determination. Since a unanimous finding had to be reached here and it was not, the death penalty cannot stand and is in violation of Delaware's Constitutional guarantee of a trial of all facts by a jury.

Defendant's argument disregards the statute itself and precedent addressing the issue at hand.

In 11 Del. C. § 4209(c), the procedure to follow after the death penalty hearing is outlined as follows:

> (c)(3)a. Upon the conclusion of the evidence and arguments the judge shall give the jury the appropriate instructions and the jury shall retire to deliberate and recommend to the Court an answer to the following questions:
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> 1. Whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating circumstance as enumerated in subsection (e) of this section; and
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> 2. Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.
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> b. The jury shall report to the Court its final vote by the number of each affirmative and negative votes on each question.

> * * * (d) Determination of sentence. (1) A sentence of death shall be imposed, after considering the recommendation of the jury, if a jury is impaneled, if the Court finds:
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> a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and
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> b. By a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. [Emphasis added.]

The statute defies defendant's contention that "nothing in the new law suggests that in requiring a finding beyond a reasonable doubt the legislature was abandoning the unanimity requirement necessary for all factual determinations." First, there is the requirement that "the jury shall report to the Court its final vote by the number of each affirmative and negative votes on each question". That requirement shows that the jury's recommendation need not be unanimous. *See Gattis v. State, supra* at 47-8 ("Thus, in a proper exercise of its legislative power, the General Assembly has given 'express statutory authority' to the jury to render to the Court a less-than unanimous recommendation.") In addition, the statutory requirement that the Court make its own determination regarding the existence of a statutory aggravating circumstance evidences the legislature's intention to abandon the unanimity requirement. The ultimate responsibility for determining the existence of an aggravating circumstance

rests with the Court. The jury makes a recommendations only, and such need not be unanimous.

Defendant's argument ignores the distinction between findings by a jury to determine guilt or innocence and findings regarding sentencing. The right to a jury trial is limited to determining guilt or innocence. *Shelton v. State*, 652 A.2d at 5-6; *Lawrie v. State*, 643 A.2d at 1346; *State v. Cohen*, 604 A.2d at 852; *Gattis v. State, supra* at 45-8. It does not extend to the sentencing phase. *Id.* The jury's findings regarding the aggravating circumstances are a part of the sentencing phase, not a part of the guilt or innocence phase. Thus, there is no constitutional right, either federal or state, to a trial by jury on the finding of the existence of a statutory aggravating circumstance. *Id.*

In conclusion, there is no right pursuant to the Delaware Constitution to unanimity of the jury in connection with the imposition of the death penalty. Defendant's argument on this ground is meritless, and the Court denies the pending motion on this ground.

Irreconcilable Conflict in Testimony

The second ground defendant advances is irreconcilable conflict in testimony. Defendant argues as follows:

> During the course of the trial, Special Agent Ron Poplas testified that he delivered a subpoena to Marguerite Capano in Stone Harbor on or about August 13, 1997. Agent Poplas testified that he did not engage in any questioning of Mrs. Capano. [Footnote omitted.] After service of the subpoena, a Motion to Quash the subpoena was filed by L. Vincent Ramunno. On or about September 5, 1997, the Government

> responded to the Motion to Quash and stated in part that at the time of service "Mrs. Capano refused to answer questions put to her by the agent who served the subpoena." [Emphasis in original.] . . . The conflict in testimony was prejudicial to Mr. Capano and his effort to convince the jury that investigative tactics were unfair and part of a plan to break his family. To the best of counsel's knowledge, the Government's response to the Motion was not in his possession at trial. It was only served upon Mr. Ramunno.

In his memoranda in support of the pending motion, defendant does not develop this argument any further nor does he cite to the law pertinent to this motion. He merely reiterates: "This conflict of testimony was prejudicial to Mr. Capano's effort to convince the jury that the State's investigative tactics were unfair and should result in a new trial being ordered." Defendant's Letter Memorandum dated July 16, 1999 at 13.

Defendant, although he does not articulate it, seeks a new trial based on newly discovered evidence, the response to the Motion to Quash. The test for determining whether he is entitled to such consists of three parts. This test is set forth in *Brittingham v. State*, Del. Supr., 608 A.2d 725 (1991)[4] as follows:

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[4] This citation leads one to a table of decisions without published opinions. A more helpful citation is as follows: *Brittingham v. State*, Del. Supr., 608 A.2d 725, 1991 Del. LEXIS 450, *3 (1991).

> (1) The new evidence must be of such a nature that it would have probably changed the result if presented to the jury;
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> (2) The evidence must have been newly discovered; it must have been discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence; and
>
> (3) The evidence must not be merely cumulative or impeaching.

Judge O'Hara has set forth the requisites in an affirmative manner as follows:

> [A] new trial should be granted where the newly discovered evidence is so conclusive in nature, or of such decisive character, that it can be said, with reasonable certainty, that the verdict would have been changed, provided the petitioner has satisfactorily shown why the evidence was not discovered or produced at the time of trial.

State v. Young, 1982 Del. Super. LEXIS 1062, *22, Del. Super., Cr.A. Nos. 77-09-0001-0004, O'Hara, J. (October 4, 1982). The Court went on to explain regarding impeachment:

> If such impeachment is so important to the main issue, so strong and convincing, that a different result would necessarily follow were a new trial to be granted, it should be granted even though this would seem to be in conflict with the general rule that mere impeaching testimony is not sufficient.

Id.

The first issue is whether the evidence was newly discovered. Counsel has stated: "To the best of counsel's knowledge, the Government's response to the Motion was not in his possession at trial." Docket Entry No. 295. That is not a sufficient allegation to support a motion for a new trial. As is clear from pre-trial motions filed, trial counsel had viewed many documents filed with the United States District Court in and for the District of Delaware in connection with the Federal Grand Jury investigation of Fahey's disappearance. There were four trial counsel, and defendant took an active part in his defense. Knowledge of one is imputed to knowledge of all. If defense counsel and/or defendant did not have knowledge of, possession of and/or access to all documents, including the response to the Motion to Quash, filed in connection with that proceeding, then all four trial counsel and the defendant should have filed affidavits stating such. Absent verified statements establishing the defense absolutely did not have knowledge of or the ability to obtain knowledge of this response to the Motion to Quash, defendant has not established that this constituted "new evidence" which was discovered after the trial. *See State v. Abner*, Del. Super., ID #: 9701021889, Silverman, J. (May 12, 1999).

Second, this evidence,[5] even if presented, would have merely been impeaching. Defendant maintains that he would have used this information to show that the tactics

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[5] I am assuming that it would be established that Detective Poplas told the Federal Government representative that he attempted to question Mrs. Capano and she refused to answer any questions. That fact, however, has not been established.

of the investigators were unfair and part of a plan to break up his family. This Court has constantly been baffled by defendant's assertion that there are some rules of fair play, other than constitutional guarantees, which governed the investigation into the disappearance of Fahey. It would have been of no significance to defendant's defense that the detective questioned Mrs. Capano or the authorities broke a family code of silence in order to determine what happened to Fahey. The evidence would be impeaching of the detective's testimony that he did not question Mrs. Capano, and nothing more.

Finally, if the impeaching evidence was allowed, the outcome of this case would not have been different. Again, because defendant focuses on the "unfairness" of how he was caught and not on the merits of the case, he fails to see that it was the mountain of evidence presented as well as his own testimony which resulted in his conviction. This impeachment evidence would have been of minuscule impact; it does not amount to anything significant which would have changed the outcome of the trial.

In conclusion, defendant has not presented any new evidence which would entitle him to a new trial pursuant to Super. Ct. Crim. R. 33.

Record of Juror's Dismissal

On December 30, 1998, during the trial in this matter, the Court received a letter from the jury foreman. The letter stated as follows in pertinent part:

> Having had several complaints from fellow jurors, I feel compelled to write and inform you

> of the situation. Apparently juror number five has been voicing his opinions of proceedings taking place in court to other members of the panel, jurors number two and seven in particular. He has, in fact, told them that he has already reached a decision in this case and has confided the same to them. They are upset about the situation and have had no success in telling this man that they are not interested in his opinions. While he has not tried to tell me anything, I have tried to make it clear to him that such discussions cannot take place. Some jurors also believe that he has been following the case in the media. As the jury foreman, I felt it was my responsibility to inform the Court and allow you to take whatever action, if any, you deem appropriate.

The Court received a second note from the jury foreman on that same date, which note stated in pertinent part:

> Discussions with the jurors this morning has made it clear even more that number five is trying to influence other members of the jury and has already decided Mr. Capano's guilt. Again, I feel that the Court has to know.

The Court met with all counsel and informed them of the contents of these letters. The Court noted that the juror referenced ("Juror No. 5") was the same juror who previously had to be chastised for reacting verbally to things that were going on in the courtroom. When it was clarified that he was making verbal comments, defense counsel stated: "He has to go."

The Court then called in Juror No. 5 to allow him to hear the allegations against him and to respond thereto. I quote from the transcript:

Q. ***

I have had a report from three jurors, three separate jurors, that indicate that you have been attempting to influence the jury, that you have been responding audibly to jurors on either side of you during the trial and that you have expressed an opinion as to the guilt or innocence of Mr. Capano to other jurors during the deliberations the last few days.

A. I have never expressed any opinion whatsoever. And as far as talking to any jurors, I don't believe I have ever mentioned anything to anybody on either side of me.

Q. But do you know any reason why three jurors would inform the Court that you have?

A. No, I do not. And if – if it is so – the Court so feels that way, I will gladly step out. Why they would say that, I do not know.

Q. Well, I certainly don't want to do anything that's an injustice to you, sir.

A. Unless –

Q. But my problem is that I now have a written letter that's a part of the record indicating that you have actively attempted to influence three jurors. And the members of the jury have complained about that.

A. I have never spoken to any jurors concerning the case. I don't know where they are getting that idea. However, if you so feel – I

don't want to disturb this case. If you want me off, I will gladly step off.

Q. It's not a question of wanting you off, sir, but I think at this particular stage I don't have much choice with the complaints of the other jurors. I think I have to excuse you.

A. Well, I would – I don't really mind one bit.

Q. All right. Well, I appreciate – I mind, because it seems to me that you have served with diligence for a long period of time. And it's a shame to not allow you to participate in the decision making process, but I don't think I have a whole lot of chance – choice.

A. Well, I would like – I know you won't do it, but I would like the right to know who is accusing me of influencing the jury.

Q. Well, the jurors on either side of you have complained to the foreman and another person has complained. And I don't know any of the names myself, sir. I asked your name. I stuck with numbers the whole way through. I don't even know who the jurors are.

A. Well, it matters not to me.

Q. All right.

A. It does hurt me.

Q. I know it does. And that's why I brought you in and talked to you, because it's not a question – not a question of this being particularly fair, but under the circumstances I don't have much of a choice.

A. That's fine. I agree. If that's the way you conduct yourself, that's fine. That's the way the court is conducted.

Q. Okay.

A. And I know – no bad feeling to anybody.

Q. Well, I appreciate your understanding. You certainly have our respect, but there is not much we can do under the circumstances.

A. Fine.

Juror No. 5 clearly was informed of the allegations against him and who two of the accusers were. Juror No. 5 denied the allegations; he did not proffer any reason for why these allegations might be untrue.

After his dismissal, Juror No. 5 sent the Court a letter which the Court cannot locate. However, it is the Court's recollection, and Juror No. 5 has confirmed, that in the letter, Juror No. 5 apologized for having to leave the case and expressed his position that he did not try to affect anyone's judgment and that he never talked to the two women who accused him of trying to influence them. He expressed his concerns that he had not had an opportunity to face the people who accused him and he wished he had had that opportunity. In that letter, Juror No. 5 did not allege that any of the jurors acted improperly or that there was a conspiracy to have him removed from the jury.

Juror No. 5 explained that after the trial was over, he called one of the defense attorneys:

I called Mr. Maurer after the trial was over. I was out of it, had nothing to do with it, and I

> told him I felt that he had done, under the circumstances, he had presented the best case he could, and I was sorry that he had lost because, as I said in the letter there to Mr. Ramunno, that it's quite possible that I was leaning the other way.
>
> And it hurt me more to say that I was going to think that that whole family and that old grandmother and those children would be looking at me and say, oh, well, I don't want to use the word, might have had something with my so and so being convicted.

Thereafter, Juror No. 5 contacted Mr. Oberly's housekeeper in an attempt to talk with Mr. Oberly. Mr. Oberly, who was concerned about contacting a juror directly, had a third party contact Juror No. 5.

On March 1, 1999, an investigator interviewed Juror No. 5. A review of a transcript[6] of that interview indicates the following accusations made by Juror No. 5.[7] One of the jurors indicated to Juror No. 5 that he felt defendant was guilty. Another of the jurors was trying to influence him by saying she did not want to be on a hung jury.

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[6] This transcript is not authenticated or certified.

[7] There are some accusations made that are irrelevant to this proceeding, such as one group of jurors was loud and some of the jurors enjoyed the testimony regarding sex. Juror No. 5 obviously did not approve of some of the other jurors' behavior. The Court only concerns itself with allegations pertaining to conduct such as discussing the case before deliberations, reaching a decision before being charged, or conspiring to have him removed from the jury.

In this interview, Juror No. 5 acknowledged that the Judge told him that he had been accused of trying to influence some members of the jury.

A letter dated April 16, 1999 from L. Vincent Ramunno, Esquire to defendant's attorney relates the following. On April 15, 1999, Juror No. 5 contacted Mr. Ramunno, who is defendant's brother-in-law. Juror No. 5 wanted to know why he was dismissed.[8] He wanted to know whether it was because the attorneys had told the Court that he was seen in a restaurant talking about the case.[9] Mr. Ramunno explained that such was not the case. Juror No. 5 complained that he had not been told of what he was accused nor had he been given the opportunity to deny or respond to the accusations. When Mr. Ramunno told Juror No. 5 that he believed he had been removed because several jurors accused him of expressing his feelings that the defendant was guilty, he responded that such was not true. Juror No. 5 then said that the jurors schemed to get him off the jury by making false allegations because they were afraid he would vote to acquit the defendant, thereby causing a hung jury. According to Mr. Ramunno, Juror No. 5 "explained that he does not believe that Tom killed Fahey and would have never convicted him. He believes that the jury knew that because of several comments or things that happened."

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[8] As noted above, the Court clearly explained to him why he was dismissed.

[9] Before Juror No. 5 was brought into the Robing Room, when the attorneys were trying to figure out who Juror No. 5 was, they asked if it was the juror "supposedly seen talking about the case in a restaurant". The Court clarified Juror No. 5 was a different person.

Juror No. 5 also alleged that a juror indicated to him that defendant was guilty. He also alleged that another juror told him that she did not want to be a part of a hung jury.

In light of the foregoing, this Court conducted an in camera interview of Juror No. 5 on July 8, 1999.[10] I summarize below the substance of that interview.

Juror No. 5 confirmed that the substance of the interview of March 1, 1999 was correct. He made the following corrections to the letter from Mr. Ramunno:

> Basically it is correct; only that the information that I did say was that I was told by a good friend who heard in Wilmington that the Capanos wanted me off the case because – something to the effect that his brother-in-law had overheard someone talking.
>
> That's basically what he said about me, and that I was under the impression from what I was told that he was guilty, guilty, guilty, and it astounded me. I didn't know where that information ever came from.

The Court then went on to question him concerning alleged juror improprieties. Juror No. 5 related that one day while he was serving, another juror came in and started discussing the case with him and said the defendant was guilty. He also explained that he had made the jurors angry on at least one occasion. He said he did not

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[10] Because the Court could not locate any law in Delaware which provided guidance in this situation, it followed the basic format as set forth in *United States v. Piccarreto*, W.D.N.Y., 718 F. Supp. 1088 (1989). However, unlike the District Court for the Western District of New York, the Court allowed the attorneys to be present at the interview.

say much except when he blew his top a couple of times. Juror No. 5 noted that one of the jurors said several times that she did not want to be on a hung jury, and he told her that could happen.

When asked if there were any reason why he did not mention in his letter to the Court his theory that the other jurors wanted to get rid of him, he responded:

> No, because at that time that had nothing to do with the fact that I was just dismissed. You know, when something is over and you have been through it the weeks that we went through it, there are always little things that come into your mind and make you wonder how much did they really wonder what the old man was thinking.
>
> I was a little uncomfortable. It was a sixth sense you have that you just can't put down a reason. It's just that I just don't know. I had nothing personal against any one of those jurors.

Defendant seeks to obtain a new trial in connection with the dismissal of Juror No. 5. He makes two basic arguments. First, the Court failed to inform Juror No. 5 of the accusations against him and it failed to provide him with the opportunity to respond to those accusations. Second, juror misconduct occurred. The first basis for asserting juror misconduct is the allegation that the jurors conspired to have Juror No. 5 removed from the case and they accomplished that removal by lying to the Court about Juror No. 5. The second basis is the allegation that at least one of the jurors was discussing this case before it was submitted to the jury and that same juror decided that defendant was guilty before deliberations began.

Defendant's arguments that the Court failed to advise Juror No. 5 of the accusations against him and it failed to provide him with the opportunity to respond thereto are blatant misrepresentations of the facts. When the State points out these misrepresentations, defendant backtracks and then misconstrues the facts, arguing, among other things, that the circumstances of the initial confrontation with Juror No. 5 were such that Juror No. 5 really could not respond to the accusations against him. The record speaks for itself and defendant's misrepresentations are ignored.

Juror No. 5 clearly was advised of the accusations against him and told who two of his accusers were. The Court provided him with the opportunity to respond to those accusations. Juror No. 5 did not adequately respond thereto. The Court dismissed him, and the defense had no objections to his dismissal.

Defendant argues that the dismissal was the result of a conspiracy. In order to accept that argument, the Court would have to accept Juror No. 5's contentions. Therefore, the Court must determine the question of his credibility. A review of the chronology of pertinent events shows that Juror No. 5's perception of the facts has changed over time.

The Court clearly informed Juror No. 5 of the accusations regarding him. After his dismissal, Juror No. 5 sent a letter to the Court wherein he did not make any accusations of a conspiracy or of juror misconduct. Thereafter, a defense investigator contacted Juror No. 5. After that contact, Juror No. 5 alleged a conspiracy theory and juror misconduct. Juror No. 5 thereafter contacted Mr. Ramunno, and during his contact with him, Juror No. 5

allegedly asked why he was dismissed from the jury when he knew the reason for his dismissal.

After considering the emerging nature of his testimony and his demeanor during his testimony under oath, I find his testimony unreliable and lacking in credibility. Consequently, there is no need for me to conduct a further investigation of the jurors or to analyze any facts in light of the law regarding juror misconduct. Therefore, defendant is not entitled to a new trial on this basis.

By letter dated August 25, 1999, defendant submitted further materials regarding another juror who was dismissed from jury duty after she was arrested on several drug and drug-related charges. This juror shall be referred to hereinafter as Juror No. 3.

Defendant provided the Court with a transcript of an interview with Juror No. 3 which took place on July 12, 1999. Juror No. 3 was interviewed by Robert Shannon,[11] "for Mr. Charles Oberly", who is defense counsel. I note in passing that this interview may have been improper. *See* Delaware Lawyers' Rules of Professional Conduct, Rule 3.10.[12]

The State is rightfully upset about the timing of this submission. Obviously the Court and the State were

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[11] This is the same person who interviewed Juror No. 5.

[12] This Rule provides:

(d) After discharge of the jury from further consideration of a case with which the lawyer was connected, a lawyer shall not ask questions of or make comments to a member of that jury.

(e) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

unaware of the interview because defendant did not request permission from the Court to conduct the interview. Although Mr. Oberly represents that he was not aware of the interview at the time it was conducted on July 12, 1999 and it only recently came to his attention, the Court attributes knowledge to Mr. Oberly of his representative's actions. The late submission of the interview has put an unnecessary burden on the State and the Court. With that said, the Court will review the submission.

The substance of that interview is summarized below.[13]

Juror No. 3 is friends with Juror No. 5. One of the jurors took notes out of the room. Then after going off the record and discussing with the investigator "some things that were happening during the trial of Thomas Capano", Juror No. 3 stated:

> Me and . . . [Juror No. 5] had conversed together a bit, you know, here and there, and we had the same point of views of the jury, or of the trial, and I just think it would have been a totally different outcome of the verdict if we, me

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[13] As was the case with Juror No. 5, I deal only with matters of substance. It is irrelevant that the jurors became cross with one another, did not exhibit common courtesy to one another, flirted with one another, or laughed about the testimony concerning sex. I also ignore allegations by Juror No. 3 which are not based upon anything she witnessed. The only matters with which the Court is concerned are those regarding alleged premature decisions on defendant's guilt and taking notes out of the jury room.

> and . . . [Juror No. 5], had sat in through the trial.
>
> * * *
>
> I think it probably would have been a hung jury. At least by two.[14]

Juror No. 3 said that she thought some of the members of the jury had a preconceived notion that the defendant was guilty. During this line of questioning, the tape recorder was again turned off "while . . . [Juror No. 3] recollects her thoughts." The interview resumed after three minutes.

Again, the Court is faced with a credibility question. If the Court gave credence to this information, then it would need to interview Juror No. 3. The Court, however, does not find the information credible or reliable. There are several reasons for that conclusion. First, Juror No. 3 and Juror No. 5 are friends. Their stories have been told after they have been contacted by defendant's representatives. Their accusations are similar. Finally, the off-the-record conversations with Juror No. 3 are problematical from a credibility standpoint.

The Court will not allow defendant to invent problems with a jury which carried out its duties as instructed. The Court will not conduct an interview of Juror No. 3 because the circumstances of the defense interview make it unreliable.

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[14] As an aside, these comments lead the Court to surmise that Juror No. 3 and Juror No. 5 were discussing the case before it was submitted to them for deliberation.

In conclusion, defendant is not entitled to a new trial on any ground pertaining to alleged juror misconduct.

Requested Interview of MacIntyre

Defendant has submitted a letter dated July 1, 1999 from a paralegal who worked on the defense team. In that letter, the paralegal relates that while the attorneys were at sidebar and while Deborah MacIntyre was on the witness stand testifying for the State, she conversed with someone. Defendant requests that he be allowed to interview Ms. MacIntyre regarding this alleged communication.

Obviously, the Court did not observe the alleged event. The defense did not point it out when it allegedly occurred and when the Court could have taken appropriate action.

Defendant's paralegal's knowledge about this event is imputed to defendant. He has waived the opportunity to question Ms. MacIntyre about any alleged conversation by failing to raise the matter before the Court when it occurred. The request for an interview is denied.

CONCLUSION

For the foregoing reasons, defendant's pending motion is denied and his request to interview Ms. MacIntyre also is denied.

IT IS SO ORDERED.

APPENDIX D

11 Del. C. § 636 (2000)

§ 636. Murder in the first degree; class A felony

(a) A person is guilty of murder in the first degree when:

(1) The person intentionally causes the death of another person;

(2) In the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, the person recklessly causes the death of another person;

(3) The person intentionally causes another person to commit suicide by force or duress;

(4) The person recklessly causes the death of a law-enforcement officer, corrections employee or fire fighter while such officer is in the lawful performance of duties;

(5) The person causes the death of another person by the use of or detonation of any bomb or similar destructive device;

(6) The person, with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of any degree of rape, unlawful sexual intercourse in the first or second degree, kidnapping, arson in the first degree, robbery in the first degree, burglary in the first degree, or immediate flight therefrom;

(7) The person causes the death of another person in order to avoid or prevent the lawful arrest of any

person, or in the course of and in furtherance of the commission or attempted commission of escape in the second degree or escape after conviction.

(b) Murder in the first degree is a class A felony and shall be punished as provided in § 4209 of this title.

APPENDIX E

11 Del. C. § 4209 (2000)

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder

(a) *Punishment for first-degree murder.* – Any person who is convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section.

(b) *Separate hearing on issue of punishment for first-degree murder.*

(1) Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by a jury, this hearing shall be conducted by the trial judge before that jury as soon as practicable after the return of the verdict of guilty. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and shall remain separately sequestered until a verdict on guilt is entered. If the verdict of the trial jury is guilty of first-degree murder said alternates shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the Court, any member of the trial jury is excused from participation in the hearing on punishment, the trial

judge shall replace such juror or jurors with alternate juror or jurors. If a jury of 12 jurors cannot participate in the hearing a separate and new jury, plus alternates, shall be selected for the hearing in accordance with the applicable rules of the Superior Court and laws of Delaware, unless the defendant(s) and the State stipulate to the use of a lesser number of jurors.

(2) If the defendant was convicted of first-degree murder by the Court, after a trial and waiver of a jury trial or after a plea of guilty or nolo contendere, the hearing shall be conducted by the trial judge before a jury, plus alternates, empaneled for that purpose and selected in accordance with the applicable rules of the Superior Court and laws of Delaware, unless said jury is waived by the State and the defendant in which case the hearing shall be conducted, if possible, by and before the trial judge who entered the finding of guilty or accepted the plea of guilty or nolo contendere.

(c) *Procedure at punishment hearing.*

(1) The sole determination for the jury or judge at the hearing provided for by this section shall be the penalty to be imposed upon the defendant for the conviction of first-degree murder. At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this section. Notice in writing of any aggravating circumstances and any mitigating circumstances shall be given to the other

side by the party seeking to introduce evidence of such circumstances prior to the punishment hearing, and after the verdict on guilt, unless in the discretion of the Court such advance notice is dispensed with as impracticable. The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence.

(2) At the hearing the Court shall permit argument by the State, the defendant and/or the defendant's counsel, on the punishment to be imposed. Such argument shall consist of opening statements by each, unless waived, opening summation by the State, rebuttal summation by the defendant and/or the defendant's counsel and closing summation by the State.

(3) a. Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate instructions and the jury shall retire to deliberate and recommend to the Court an answer to the following questions:

1. Whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating circumstance as enumerated in subsection (e) of this section; and

2. Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

b. The jury shall report to the Court its final vote by the number of each affirmative and negative votes on each question.

(4) In the instructions to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.

(d) *Determination of sentence.*

(1) A sentence of death shall be imposed, after considering the recommendation of the jury, if a jury is impaneled, if the Court finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. By a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.

(2) Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction.

(3) If the Court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based.

(e) *Aggravating circumstances.*

(1) In order for a sentence of death to be imposed, the judge must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

a. The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement.

b. The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody.

c. The murder was committed against any law-enforcement officer, corrections employee or firefighter, while such victim was engaged in the performance of official duties.

d. The murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of an official duty.

e. The murder was committed against a person who was held or otherwise detained as a shield or hostage.

f. The murder was committed against a person who was held or detained by the defendant for ransom or reward.

g. The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime, or in retaliation for the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime.

h. The defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

i. The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person.

j. The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.

k. The defendant's course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct.

l. The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim.

m. The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person.

n. The defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder.

o. The murder was committed for pecuniary gain.

p. The victim was pregnant.

q. The victim was severely handicapped or severely disabled.

r. The victim was 62 years of age or older.

s. The victim was a child 14 years of age or younger, and the murder was committed by an individual who is at least 4 years older than the victim.

t. At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity, and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

u. The murder was premeditated and the result of substantial planning. Such planning must be as to the commission of the murder itself and not simply as to the commission or attempted commission of any underlying felony.

v. The murder was committed for the purpose of interfering with the victim's free exercise or enjoyment of any right, privilege or immunity protected by the First Amendment to the United States Constitution, or because the victim has exercised or enjoyed said rights, or because of the victim's race, religion, color, disability, national origin or ancestry.

(2) In any case where the defendant has been convicted of murder in the first degree in violation of any provision of § 636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed. This provision shall not preclude the jury, or judge where applicable, from considering and finding the statutory aggravating circumstances listed in this subsection and any other aggravating circumstances established by the evidence.

(f) *Method and imposition of sentence of death.* – The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses which shall not exceed 10, and conditions of privacy, and shall occur between the hours of 12:01 a.m. and 3:00 a.m. on the date set by the trial court. The trial court shall permit one adult member of the immediate family of the victim, as defined in § 4350(c) of this title, or the victim's designee, to witness the execution of a sentence of death pursuant to the rules of the court, if the family provides reasonable notice of its desire to be so represented. Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person

sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction. The administration of the required lethal substance or substances required by this section shall not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the Commissioner or the Commissioner's designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided for in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

If the execution of the sentence of death as provided above is held unconstitutional by a court of competent jurisdiction, then punishment of death shall, in all cases, be inflicted by hanging by the neck. The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses and conditions of privacy. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

(g) *Automatic review of death penalty by Delaware Supreme Court.*

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the recommendation on and imposition of that penalty shall be reviewed on the record by the Delaware Supreme Court. Absent an appeal having been taken by the defendant upon the expiration of 30 days after the sentence of death has been imposed, the Clerk of the Superior Court shall require a complete transcript of the punishment hearing to be prepared promptly and within 10 days after receipt of that transcript the clerk shall transmit the transcript, together with a notice prepared by the clerk, to the Delaware Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant, the name and address of any attorney and a narrative statement of the judgment, the offense and the punishment prescribed. The Court shall, if necessary, appoint counsel to respond to the State's positions in the review proceedings.

(2) The Supreme Court shall limit its review under this section to the recommendation on and imposition of the penalty of death and shall determine:

a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.

b. Whether the evidence supports the judge's finding of a statutory aggravating circumstance as enumerated in subsection (e) of this section and, where applicable, § 636(a)(2)-(7) of this title.

(3) The Supreme Court shall permit the defendant and the State to submit briefs within the time provided by the Court, and permit them to present oral argument to the Court.

(4) With regard to review of the sentence in accordance with this subsection, the Court shall:

a. Affirm the sentence of death.

b. Set aside the sentence of death and remand for correction of any errors occurring during the hearing and for imposition of the appropriate penalty. Such errors shall not affect the determination of guilt and shall not preclude the reimposition of death where appropriately determined after a new hearing on punishment.

c. Set forth its findings as to the reasons for its actions.

(h) *Ordinary review not affected by section.* – Any error in the guilt phase of the trial may be raised as provided by law and rules of court and shall be in addition to the review of punishment provided by this section.

APPENDIX F

IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
VS.	)	9711006198
THOMAS J. CAPANO,	)	
	)	
Defendant.	)	
	)	

BEFORE: HON. WILLIAM SWAIN LEE, J.
and a jury

Trial Transcript
October 26, 1998

* * *

[129] Q. Okay. Let me ask you directly. Did you ever hear that she fainted in the Governor's office in Wilmington on Wednesday, June 12th, 1996?

A. Not until much, much later.

Q. But you did hear that later?

A. I didn't hear it until we started with the trial and everything involved in this.

Q. Did you also hear that she called Tom Capano to come get her?

A. Yes, I heard that.

Q. And that Tom Capano came and got her?

A. Yes.

Q. And that she ended up taking the rest of the afternoon off?

A. Yes.

* * *

November 10, 1998

* * *

[138] If you thought I was bad on the stand, God fucking help you [139] if this goes to trial. I'll think up even more shit to keep my ass out of fucking jail. And I'll make up fucking shit as I go along to keep Tommy in there for fucking life. I hate him. You got ten fucking minutes to call me back or you'll never see my kids again. I'm not threatening you, but if you don't call me back in ten minutes, you can go fuck yourself. . . .

Did you make that call and make that statement, Gerry?

A. I'm sure I did, if you have it on tape.

* * *

December 22, 1998

* * *

[36] Q. That's okay.

After Deborah left, can you give us the best estimate as to what time she left? I know it's not precise.

A. I would say she left between two and 2:30 in the morning?

Q. What did you do after she left?

A. I sat by myself and battled my emotions, one, and then started thinking of what I was going to do next.

Q. What did you conclude that you were going to do next?

A. That I was going to attempt to keep this hidden, and that I was going to bury Anne Marie's – the cooler with Anne Marie in it.

Q. Did you decide how you were going to do that, do both of those things, how you were going to [37] keep it secret and how you were going to bury the cooler?

A. Well, I was going to keep it secret by not telling anyone and also telling Debbie not to tell anyone. I decided that the best way – it occurred to me that the best way for me to dispose of the cooler was not – was a burial at sea.

Q. Now, going back, to keep it secret, you had had a year's experience as a defense lawyer and two years as prosecutor.

A. Yes.

Q. Did you know whether or not you would be a suspect immediately, having been the last person to see Anne Marie?

A. Yes.

Q. Did you know that incredible heat would come down on you?

A. Well, I thought some heat would come down on me but nothing like what did come down.

Q. Did you know –

MR. CONNOLLY: Objection; leading.

Q. Would you tell us, sir, how you intended to keep this secret?

[38] A. I wasn't sure. I mean in my mind I wasn't exactly functioning at a fully rational state. All I knew was that I wanted to keep a secret which ultimately I changed my mind on that.

But at the time we're talking about, I didn't have a specific plan; just, you know, I have to keep this quiet to selfishly protect myself and unselfishly protect Debbie.

* * *

December 30, 1998

* * *

[21] Q. And you were also thinking that if you got rid of the gun, you would make it impossible to disprove or corroborate what occurred in that apartment; correct?

A. No, I don't believe that's the case. I mean, any thinking I was doing that night, as I said, was unclear, the result of panic. And I also have said that it was cowardly and reprehensible. But I wasn't so specific that – with respect to the gun that I was going through the analysis that you just went through, because that indicates – you

know, that's a clear, very rational analysis. And I was in no condition to do that that night. Basically I wanted to get rid of the gun because I wanted to get rid of the gun.

* * *

January 11, 1999

* * *

[165] MR. O'DONNELL: We said we have to persuade [166] you. Your inclination was not to give lessers. I've been dispatched to make that argument.

THE COURT: All right.

* * *

[199] Now, are we ready to address the issue of proposed lessers? Anything we have now is ready to go to the printer.

* * *

MR. O'DONNELL: Yes. This is a little bit complicated. And hopefully, I think I can present it in about five minutes if I'm not interrupted. If that helps at all.

THE COURT: I'll try not to interrupt you, Jack.

MR. O'DONNELL: Okay. It seems to me that, well, we know that the indictment charges first degree murder, which is intentional killing as defined by the instructions committed by a voluntary act of the defendant.

We know what his testimony is, which is essentially that he did not do that. There's very little direct evidence

in this case concerning the events of June 27. State got a few things but, frankly, [200] most of the strength of their case goes more to substantial planning, the premeditation part which is not something the jury decides now than it does to the question of intent.

And conversely, we have evidence that falls on the other side. For example, some of the evidence in favor of the State: Debby MacIntyre says she purchased the gun for him; he denies that; the testimony concerning the extortion that comes from various witnesses and has come in different packages; the cooler, whether it was bought for the purpose the State intends or whether it was bought at Joe Capano's suggestion; whether Tom was a jealous maniac or not.

We believe that there's substantial evidence in the record to refute the issue of an intentional killing; namely, the purchase of the Jackson Brown tickets, e-mail connecting – or asking her to save that date in August; that came out in April or May; the fact that Kay Ryan was surprised to see Tom that morning; the fact that there was no plan to see Gerry and, in fact, Gerry and Louie both say it was only pure luck that Gerry was there; normally, he's at Stone Harbor in late June; Susan testified Tom was fine when she saw him [201] 5:30, six o'clock; testimony of various witnesses earlier in the week and on the 27th; Tom was trying to set up a golf game for the 28th; Henry Supinski's testimony that he expected to walk with Tom Capano on the 28th – all of this evidence cuts against the grain of an intentional killing.

We know that under Ward versus State there must be a rational basis in the evidence for you to give lessers.

What the Court indicated last week is that the Court is under the belief at this point that either the jury will come back with a verdict of murder in the first degree or, if they accept Tom's explanation, it was an accident for which he has no criminal culpability.

It seems to us, and we are specifically making a request that the Court charge in the following lessers; second degree murder, manslaughter, criminally negligent homicide, and abuse of a corpse,

THE COURT: I don't believe abuse of a corpse is a lesser, and for that reason, I mean, I don't think you can find anything within intentional – within the definition of intentional homicide that involves abuse of a corpse. This is a separate offense and therefore [202] I'm not going to charge on that as a lesser.

Let' address the others. Excuse the interruption. I didn't want to waste time on that because I wasn't going to buy it.

MR. O'DONNELL: At the end, I would like to throw in two cents to complete the record for appellate purposes on that.

It seems to me that the jury could well conclude that Tom Capano's action – if Tom Capano was to be believed, then his reaching out for the arm of Debby MacIntyre is in fact what caused that gun to discharge, which then becomes the proximate cause of Anne Marie Fahey's death. It seems that the jury could conclude under the circumstances as he described then it was reckless, that he had an indifference to the risk of what his action might do, which would support second degree murder, or it

was plain and simple reckless which would support manslaughter, or that he simply was unaware of the risk of death by doing that because he didn't see a clip in the gun and, therefore, it was negligently culpable.

There is one case that's not exactly on point. Well, I've done most of the research. Gene has given me [203] all his cheat sheets from trying these cases, couldn't find anything directly on point. I don't know. This state has one case, Zebrowski versus State, that is analogous in a way. I got the cite here.

Is the Court familiar with that case?

THE COURT: No.

MR. O'DONNELL: 715 A.2d 75.

MR. OBERLY: What page?

MR. O'DONNELL: Seventy-five. In that case, two guys decided to take a semi-automatic handgun after doing drugs and drinking all day and rob the gas station. One of the defendants, Sarro, S-A-R-R-O, was cut a deal with the State, testified against Zebrowski. He never testifies. The opinion doesn't tell you exactly what he said. But the inference there, certain testimony presented in the record comes from his agreement that was admitted with both side's consent. And that is that Zebrowski goes and points the gun at the attendant. The attendant doesn't move. Doesn't really comply. The gun is fired. The attendant dies.

At trial, Zebrowski testifies that Sarro, the other co-defendant, punched the attendant in the mouth which caused him to flinch and the gun accidentally [204] discharged. That was his defense at trial.

There was evidence also presented by an ATF expert that the trigger pull on that particular gun was 12 and a half pounds, substantially more than what we have here, and that Zebrowski was intimately familiar with the use of firearms based on his background and experience, which is the direct opposite of what we have here. The evidence in the record here I think rather conclusively is that Tom Capano didn't know a damn thing about guns. That comes from Gerry. That only distinguishing facts between the two cases was the pointing of the gun.

Now, in Zebrowski, the trial court gave instructions on second degree murder and manslaughter, and the issue on appeal was whether it was error to not give criminally negligent homicide. And the Supreme Court agrees with the trial court that it was not error to do that because of the intentional pointing of the gun which in fact we don't have in this case. But it seems to me that under those circumstances where the defendant testifies essentially that there was an accident, the Delaware Supreme Court has agreed that it was proper, and I'm requesting the charge for second [205] degree murder and for manslaughter.

It seems to me because of the dissimilarity in the facts in this case, the reason for not charging criminally negligent homicide in this case is not present in this case. And therefore, it would be proper for the Court to charge on criminally negligent homicide here as well.

The last argument I would make is, although this case I'm not citing for any other reason than the language, is Gates versus State, 424 A.2d 18. It relies on Keeble versus United States, one of the first U.S. Supreme

Court decisions along with Beck versus Alabama on lessers; Keeble 412 U.S. 205, that due process, and I would argue under both Delaware and United States Constitution, guarantees a defendant instructions on lesser includeds if the evidence, under any stretch of the evidence, warrants it. And the reason for that is if there's any evidence in the record the jury should not be required to have to choose only between the extremes. And there's an implication that the due process clause of fundamental fairness jumps in at that point.

MR. MAURER: Just a moment to consult.

[206] MR. O'DONNELL: One last point is this. Since the State has not presented any direct evidence of what happened that night, including no direct evidence as to whether or not the killing was intentional, the jury is entitled to infer from that that any killing that occurred in that room was not intentional and therefore could have been recklessly indifferent, whatever all the words are in the standard for second degree murder, or reckless pursuant to the manslaughter standard, or criminally negligent pursuant to the criminally negligent homicide standard.

You want to jump in here?

MR. MAURER: No. I was just going to say that last argument is something we discussed earlier very briefly. We argue that the absence of any direct evidence of what occurred in that room allows the jury to reach a conclusion that if in fact they believe that Tom Capano killed her, evidence of recklessness or criminal negligence is equally plausible to that of intent. And on that basis, which is a separate basis I think than the other request,

we're saying if they reach the conclusion that Tom killed her, while there's no direct evidence as to what occurred in the room, and [207] therefore either conclusion or any of those conclusions are equally plausible.

THE COURT: I understand that argument and I'll give the State a chance to respond to it. My concern here is that there's no question that intent is being proffered by the State in this particular case based upon circumstantial evidence of prior preparation, which, although it is an aggravating circumstance in this case, is a showing of planning and, therefore, the intent to carry out the plan which you've created and the subsequent acts which tend to give some indication of guilt as to what is of course subject to argument. The fact of the matter is that the State's theory produces some evidence of intent, but there isn't any evidence of recklessness or negligence in this particular case. That's not there. And Jack's basic argument is that it may have been reckless or negligent to try and disarm a woman with a gun.

I'm sorry, folks. I'll never let that go to the jury. If that's what the State was relying on, you'd have an acquittal right here. If I was going to acquit on it, I sure as heck can't charge it as a lesser included. I don't think there's anything there. If all [208] we had now was his statement and there was no other evidence to be considered, that's an acquittal. If I accept his testimony, there's no way I'd let that go to a jury. I think if I wouldn't let it as a matter of law – I would rule he was not guilty under

those circumstances, there's no way I could charge as a lesser included, gentlemen.

* * *

January 28, 1999

* * *

[72] Now, the first question, has the State proven beyond a reasonable doubt that the murder of Anne Marie Fahey was committed as a result of substantial planning [73] and premeditation, I'm barely going to touch upon, because it was rather unusual about this case, because we did not have a body, because the only living person who knows exactly what happened at the instant of Anne Marie Fahey's death is Tom Capano. As a result of the absence of all the forensic evidence, the State proved intent by showing the planning that the defendant had engaged in beginning at least as early as February of 1996 when he approached Gerry the first time and he continued.

So what I'll do is just remind you of some of the categories that I discussed in the closing argument of the guilt phase. The things to look at.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
VS.	)	9711006198
THOMAS J. CAPANO,	)	
	)	
Defendant.	)	

BEFORE: HON. WILLIAM SWAIN LEE, J.
and a jury

STATE'S EXHIBIT 147

* * *

[13] Connolly:	Do you own any handguns?
MacIntyre:	I did.
Connolly:	And what type of handgun, well, when did you own a handgun?
MacIntyre:	Uh, probably, I purchased one for self-defense a few years ago. Um, I hate guns. I've never been comfortable with them, but I was uncomfortable where I lived and I didn't, I thought for some reason that I might be able to use it. I have a friend who teaches a course in ga, shooting guns or training and she said she would teach me, and I purchased one and never took it out of the box. And, uh, one day I came home at the end of school and my son was walking around my room just looking in my closet and I got nervous. So I took it apart. I don't even know what it was. It was a little, little gun. And I

took it apart and I threw it away in, uh, separate bags.

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[23] Connolly: Mmm huh. Did you ever fire the gun?

MacIntyre: No.

Connolly: Did the gun remain in your exclusive possession from the time you bought it until the time you threw it away?

MacIntyre: Yes.

Connolly: And you're very certain that nobody else ever handled that gun?

MacIntyre: Yes, except for the man who sold it to me.

Connolly: So nobody else ever touched that . . .

[24] MacIntyre: Nope.

Connolly: . . . gun?

MacIntyre: No, after I threw it away, you know.

Connolly: Did you discuss with Tom Capano your intention to dispose of the gun prior to when you got rid of it?

MacIntyre: No.

Connolly: You're very certain about that?

MacIntyre: Yes.

Connolly: Absolutely certain?

MacIntyre: I am absolutely certain about it.

Connolly: When did you first tell him that you had gotten rid of the gun?

MacIntyre: Probably shortly thereafter. I mean I did it right away. Probably the next day I told him. Say Sunday.

Connolly: And what was his reaction.

MacIntyre: "Good. Update your security system."

Connolly: Are you, and I want to remind you that you're under oath.

MacIntyre: Yes.

Connolly: Are you absolutely certain that Tom Capano never touched that gun?

MacIntyre: Yes. To my best, the best of my knowledge.

Connolly: Did you ever show him the gun?

MacIntyre: No.

[25] Connolly: Did you ever lend him the gun?

MacIntyre: No.

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